

# DOCKET SECTION

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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OFFICE OF THE SECRETARY

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Postal Rate and Fee Changes, 1997  
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Docket No. R97

## MAIL ORDER ASSOCIATION OF AMERICA REPLY TO MOTIONS SEEKING A DELAY IN THE PROCEEDINGS OR THE EXCLUSION OF EVIDENCE

In accordance with Presiding Officers Ruling No. R97-1/42 dated October 10, 1997, as modified by Ruling R97-1/49 dated October 17, 1997, the Mail Order Association of America (MOAA) hereby replies to the following motions:

1. Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings dated October 16, 1997 ("ANM" and "ALA").
2. NASHUA Photo Inc., District Photo Inc., Mystic Color Lab and Seattle Film Works, Inc., Motion to Strike Specific Portions of the Testimony of Various Postal Service Witnesses and Certain Library References and For Other Relief dated October 16, 1997 ("NDMS").
3. Newspaper Association of America Motion in Opposition to Admission into Evidence of Certain Library Reference Materials and Supplemental Testimony, USPS-ST-44 dated October 16, 1997 ("NAA").

## INTRODUCTION

The motions to strike or to exclude are wholly without merit. No valid grounds have been advanced by NDMS or NAA to support the exclusion of any of the Library References in issue on the grounds of either prejudice or a denial of due process. To the contrary, exclusion would deny due process to both the Postal Service and those parties who believe that the disputed Library References are valid support for changes in certain rate designs.

Additionally, the motion to stay the proceeding, as such, is beyond the power of the Commission. A closer question is whether the facts support the Commission's exercise of its authority under §3624 (c)(2) to extend the 10-month period established in §3624 (c)(1) by making a determination that the Postal Service has "unreasonably delayed consideration" of its request by failing "to respond within a reasonable time to a lawful order of the Commission."

### **The Motions of NDMS and NAA are Without Merit**

Much of the argument advanced by NDMS is at this time simply moot. Specifically, the evidentiary status of Library References and the extent to which witnesses may rely upon such references is no longer an issue since the Postal Service has produced sponsoring witnesses. Further, contentions that the Service has not complied with Commission Rule 53 are overblown. The Rule requires that "prepared written testimony and documentary exhibits" be filed "simultaneously" with the filing of a request for changes in rates or fees. The Postal Service did file "simultaneously" with its request for changes in rates and fees all of the Library References that are the subject of the motions and the reliance of witnesses upon those Library References was made explicitly clear.

The motions, however, argue that since Library References are not "evidence" and since they are now scheduled to become "evidence," it follows, *ipso facto*, that the Postal Service has violated the Commission's rules. The analysis is far too facile. The use of Library References and work papers has long been recognized under PRC practice. The Postal Service's conduct in this proceeding is in accord with past conduct. Indeed, the Postal Service has in this proceeding gone to extraordinary lengths to ensure that the parties are provided with all of the data used to support the proposed changes in rates and fees and classifications.

In addition to the fact that the reliance of Postal Service witnesses upon the disputed library references has been clear from the beginning, the Postal Service has responded to extensive discovery directed to the References. That such Library References were not initially labeled as "testimony" has not in any way hampered the parties from discovery or the preparation and submission of such rebuttal testimony as they deem to be appropriate. Clearly no party has been prejudiced.<sup>1</sup>

Until such time as a witness has taken the stand and adopted "testimony" it does not constitute "evidence." Had the Postal Service presented the disputed Library References as "testimony," there would have been little difference in the timing of the admission of the materials into "evidence" then will be the case under the procedure now proposed by the Postal Service. Again, all of the disputed material has been available to the parties from the beginning of this proceeding; all parties have, to the extent they considered it necessary to do so, availed

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<sup>1</sup> Significantly, ANM, ALA and NAA do not claim any prejudice from the acceptance of the Library References into evidence at this time. Rather, their positions are premised on what they maintain to be failures of the Postal Service to comply with the rules of the Commission. Acceptance of the contentions provides no basis for the Commission to refuse to accept the testimony into evidence. The Commissions only power would be to exercise its authority under §3624(c).

themselves of discovery; and all parties have been on notice from the filing of the Postal Service request that disagreements with the Library References would have to be addressed. In sum, the NDMS claim of prejudice lacks credibility.

Special Rule 5 recognizes by its terms the validity and appropriateness of the use of Library References. More important, it provides that a Library Reference may, during the course of the proceeding, become "evidence.": "Library material is not evidence unless and until it is designated and sponsored by a witness." Thus, under the Rule, material initially filed as a Library Reference may subsequently be "designated and sponsored by a witness." That is precisely what has taken place in this proceeding.

Special Rule 2 also supports the proposition that the conversion of a Library Reference into sponsored testimony during the course of the proceeding is in accord with Commission practice. The Rule states in part that the results of either formal or informal discovery procedures "may be introduced into the record by ... supplementary testimony or exhibit, by presenting selected written interrogatories and answers for adoption by a witness at the hearing, or by other appropriate means." The need for the Library References to be admitted into the record as "evidence" emerged as a result of discovery and motions practice. Thereafter, in accordance with the Rule the Postal Service has "sponsored .....a witness" for each disputed Library Reference.

NAA cites *Mail Order Association of America v. United States Postal Service*, 2 F.3d 408 (D.C. cir.1993) to support its position, but that case is wholly inapposite. In *MOAA*, the Court remanded the case because "the Commission's novel access cost methodology was never subjected to scrutiny during the hearing....." *MOAA*, 2 F.3d at 429. Instead, "the Commission began to release its voluminous work papers" only after the Commission issued its decision with

the challenged methodology emerging "full grown from the Commission's collective brain" after the closing of the record. *Id at 429, 430.*<sup>2</sup>

The contrast between the facts in *MOAA* and the situation in this docket could not be more stark. All parties have had full knowledge of and access to the Library References upon which the USPS has relied. They have had an opportunity to engage in such discovery of that material as deemed necessary. They will also be afforded oral cross examination and will be able to introduce such rebuttal testimony as deemed necessary.

MOAA regrets that the Postal Service did not treat the Library References as "testimony" from the beginning. In the end, however, it has made no difference to the due process rights of the parties. As this case has developed, the difference between the filing of the material as Library References and the filing of "testimony" with a "USPS-T" designation is a distinction without a difference. It amounts to no more than a technicality and provides no basis for exclusion or "striking." The Library References have now been sponsored by Postal Service witnesses, subsequent to a full opportunity for written discovery. The witnesses should now be scheduled to permit introduction of the materials into "evidence" and the conduct of oral cross examination.

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<sup>2</sup> See also: *Newsweek, Inc. v. U.S. Postal Service*, 663 F.2d 1186, 1205(2d. Cir.1992) (record hearing requirement of §3624(a) violated because no "discovery or cross examination permitted.") and *Louisiana Ass'n of Indep. Producers v. F.E.R.C.*, 958 F.2d 1101, 1114 (D.C.Cir.1992) (no due process violation when parties had "an opportunity to review [the evidence], and a chance to submit briefs criticizing it and evidence contradicting it...")

## **The Motion to Stay Cannot be Granted**

ANM and ALA's motion to "stay proceedings" (also supported, alternatively, by NDMS) presents a somewhat more difficult question.<sup>3</sup> The only Commission authority to delay the 10-month period is that contained in 39 U.S.C. §3624(c)(2). That section gives the Commission authority to extend the 10-month period "by one day for each day of such delay" resulting from the Postal Service's failure "to respond within a reasonable time to any lawful order of the Commission....." ANM and ALA, without analysis, contend that the section permits the Commission to stay the proceeding and delay the statutory deadline "until the USPS files an amended request that complies fully with the Commission's evidentiary rules, and interested parties have had a full opportunity to engage in discovery of the Postal Service's amended filing." Motion at 16.

Apparently, the motion is premised upon the position that the Commission's rules can be deemed to be "a lawful order" and, therefore, if the Commission concludes that the Postal Service has failed to comply with those rules, it is authorized to invoke the provisions of §3624(c)(2). That is a possible, although probably not the best, reading of the statute. The pertinent subsection states:

In any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made

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<sup>3</sup> ANM and ALA's motion is alone in contending that the Postal Service has violated anything other than the Commission's Rule 53. Specifically, they contend that the service has not complied with Rules 31, 54, and 54(o). MOAA has not attempted to rebut those allegations. MOAA does however make two points. First, much of the understandable frustration is a result not of a lack of data but the extraordinary abundance of such data. This in itself has made it difficult for the parties to comprehend and participate in the proceedings as fully and helpfully as might be desired, particularly within the context to the required 10-month constraint. Second, one cannot help but believe that to some extent the complaints are the product of a litigious mind. Can there be any question about the ability of lawyers to allege the inadequacy of any filing made by the Postal Service, particularly given the myriad and detailed requirements established by the Commission's rules?

by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful order of the Commission, the Commission may extend the 10-month period described in paragraph (1) of this subsection by one day for each day of such delay.

Under a plain reading, the statute appears to address only the failure of the Postal Service to comply with a lawful order during the course of the 10-month proceeding. Given the fact that the Commission's authority can be exercised only after the Postal Service has failed to respond to an order "within a reasonable time," the most sensible and straight forward interpretation would appear to be that it applies only to specific orders requiring the Postal Service to take particular actions or submit particular data.

Although legislative history is scanty, that which exists supports the above interpretation. The House Conference Report explains that "the Commission has been granted the additional authority to suspend implementation of proposed temporary rates an (sic) a day for day basis when it determines that the Postal Service has engaged in undue delays during consideration of rate cases." (*emphasis added*) *H.R. Conf. Rep. No. 94-1444 at 17 (1976) (reprinted in 1976 U.S.C.C.A.N. at 2438.)* This interpretation is also buttressed by the House Report which addresses only Postal Service delays in the course of the proceeding, i.e. delays "in responding to interrogatories and supplying data" *H.R. Rep. No. 8603, at 59 (1976)*.

Even if the section is interpreted as applying to the rules of the Commission rather than just Commission "orders" during the course of a particular 10-month proceeding, the Commission is not given *carte blanche* to suspend or stay the proceedings as requested by ANM, ALA and NDMS (and by OCA in its "Reply").<sup>4</sup> Rather, the Commission is limited to extending

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<sup>4</sup> Office of Consumer Advocate Reply to Motion of Alliance of Nonprofit Mailers and American Library Association to Stay Proceedings, dated October 21, 1997.

the 10-month period by no more than "one day for each day" that the service has "unreasonably delayed" the proceeding by its failure to respond to a lawful order "within a reasonable time. This carefully circumscribed "day for day" language simply does not permit the Commission to "stay" the proceeding as requested by movants. Instead, the Commission must determine what, if any, delay has been caused by the Postal Service's failure to respond to a lawful order and limit any extension to that period.

The moving parties and the OCA in effect urge the Commission to find that the "day for day" delay is equal to the entire period that has elapsed since the Postal Service filed its request. Clearly, the statute requires that the Postal Service be given notice that a failure to respond to a lawful order will result in a day for day delay in the 10-month period. The notion that the commission can, months into the proceeding, determine that the Postal Service has caused a delay equal to the period between the filing and the date of the determination of unreasonable delay is wholly at odds with a common sense reading of the governing statutory language.

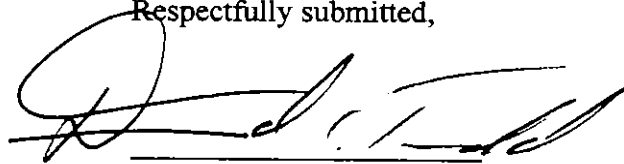
The Commission's authority to extend the 10-month deadline requires findings that a Postal Service failure to obey lawful orders has "unreasonably delayed consideration of the" Service's request and a calculation of the number of days of such delay. Neither reciting the filing of late responses to interrogatories, as done by the OCA, nor the other broad brush attacks on the Postal Service's conduct completes the required analysis. The relief requested by the moving parties and the OCA bears no relationship to any conceivable delay that could be ascribed to the failure of the Postal Service to comply with a lawful order.

The only basis for extending the 10-month deadline is for the Commission to determine that: (1) the failure of the Postal Service to designate the library references as "testimony" as of



the time that the case was filed (or late interrogatory responses) has prejudiced the parties, (2) additional time must therefore be given prior to oral cross examination of the sponsoring witnesses, and (3) such additional time requires an extension of the 10-month period. Given the fact that the Library References have been available from the beginning, at most, only a brief delay could possibly be justified.

Respectfully submitted,

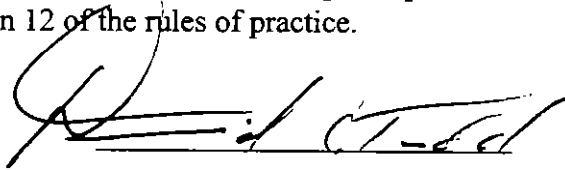


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Dated October 24, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that I have served this Motion upon all participants of record in this proceeding in accordance with Section 12 of the rules of practice.



David C. Todd